BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL J. BARTLETT	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,062,477
INTERSTATE BRANDS CORPORATION	)	
Respondent	)	
AND	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the October 19, 2012, Order Referring Claimant for Independent Medical Evaluation entered by Administrative Law Judge (ALJ) Brad E. Avery. John M. Ostrowski of Topeka, Kansas, appeared for claimant. Steven J. Quinn of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 18, 2012, preliminary hearing and exhibits thereto; the transcript of the October 9, 2012, discovery deposition of claimant and exhibit thereto;[1] and all pleadings contained in the administrative file.

ISSUES

In his October 19, 2012, Order ALJ Avery did not make a finding that claimant did or did not sustain injuries by repetitive trauma arising out of and in the course of his employment with respondent. Instead, ALJ Avery ordered claimant to undergo an independent medical examination (IME) by Dr. Edward J. Prostic and that Dr. Prostic

[1] The parties agreed at the preliminary hearing to consider claimant's October 9, 2012, discovery deposition and exhibit thereto part of the record.

render opinions on several matters, including causation. After receiving Dr. Prostic's IME report, ALJ Avery issued another order on November 7, 2012, awarding claimant temporary total disability benefits and authorizing medical treatment by Dr. Kendall M. Wright and finding:

> Claimant did suffer a repetitive trauma (DOA: 9/9/12). Claimant's alleged accidental injury did arise out of and in the course of employment. Claimant's work caused the repetitive trauma. Repetitive trauma was the prevailing factor causing the medical condition and disability.[2]

Respondent argues ALJ Avery exceeded his authority by making respondent pay for a benefit, the IME, without first finding claimant sustained a personal injury by accident, series of accidents or occupational disease arising out of and in the course of his employment with respondent. In the alternative, respondent argues the ALJ erred by finding in his November 7, 2012, Order for Compensation that claimant sustained accidental injury arising out of and in the course of his employment with respondent.

Claimant asserts the Board does not have jurisdiction to review ALJ Avery's October 19, 2012, and November 7, 2012, orders. Claimant argues the October 19, 2012, Order appointing Dr. Prostic to conduct an IME of claimant is an interlocutory order and, therefore, is not an appealable issue. Claimant argues the Board does not have jurisdiction to review ALJ Avery's November 7, 2012, Order as neither party appealed that order.

The issues before the Board are:

1. Does the Board have jurisdiction to consider whether the ALJ, in his October 19, 2012, Order, erred in ordering that claimant undergo an independent medical examination?

2. Does the Board have jurisdiction to review ALJ Avery's November 7, 2012, Order?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant alleged that he sustained bilateral shoulder injuries. In his application for hearing, claimant asserted that the date of accident was a "series through 9/8/12 and/or more definitive accidents on or about 4/6/12 & 9/8/12."[3] Claimant testified he felt a sudden

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[2] ALJ Order (Nov. 7, 2012) at 1.

[3] Application for Hearing (filed Sept. 21, 2012).

onset of pain in his left shoulder on April 6, 2012, while filling in for a pan setter. On April 15, 2012, claimant reported bilateral shoulder pain to his supervisor, Myo Tovar. Claimant also requested to see a doctor to get his injuries fixed.

Claimant sought medical treatment for both shoulders from his family physician, Dr. Kendall M. Wright, and also from Dr. Dale Garrett. Dr. Wright saw claimant several times from January 23 through August 1, 2012. Dr. Wright's January 23, 2012, notes indicated he was seeing claimant for bilateral shoulder pain with an onset of six months earlier. Dr. Wright recommended evaluation of both shoulders with an MRI. Dr. Wright stated in his August 1, 2012, notes that claimant had bilateral shoulder pain and had applied for workers compensation benefits.

Dr. Garrett saw claimant for the first time on April 23, 2012, and indicated claimant reported bilateral shoulder pain. He diagnosed claimant with a bilateral shoulder sprain/strain. Dr. Garrett's notes from that visit indicated that it could not be determined at this time if claimant's condition was work related. Dr. Garrett last saw claimant on May 25, 2012. Drs. Garrett and Wright treated claimant conservatively and neither physician restricted claimant's work activities.

Claimant testified that on September 9, 2012, he injured his right shoulder when he was mixing cinnamon and lifted a bag of flour. Claimant reported the incident to his supervisor, Preston Yuny. According to claimant, the next day he sought treatment for his right shoulder at Newman Memorial Hospital emergency room in Emporia, Kansas.[4] Both shoulders were x-rayed. On September 11, 2012, claimant sought medical treatment for his right shoulder at Newman Medical Partners, where he saw Sherry S. Smiley, APRN, because Dr. Wright was unavailable. Ms. Smiley took claimant off work for one month. That was the first time claimant was taken off work or received restrictions for either shoulder.

On October 16, 2012, Dr. Wright and Ms. Smiley completed a checklist provided in a letter to them from claimant's counsel. Dr. Wright and Ms. Smiley indicated, (1) the prevailing factor in claimant's chronic bilateral shoulder problem is overuse syndrome caused by his employment with respondent; (2) the prevailing factor in claimant's need for treatment relative to his chronic bilateral shoulder problem is overuse syndrome caused by his employment with respondent and (3) the prevailing factor in claimant's need for being off work relative to his chronic bilateral shoulder problem is overuse syndrome caused by his employment with respondent.[5]

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[4] This could be an error, as records from Newman Memorial Hospital indicated claimant arrived there on September 9, 2012.

[5] P.H. Trans., Cl. Ex. 2 at 2.

After the preliminary hearing was concluded, ALJ Avery ordered claimant to undergo an IME by Dr. Prostic. ALJ Avery requested that Dr. Prostic, after the IME was completed, do the following:

> (1) The doctor is asked to render an opinion regarding whether claimant suffered a series of accidental injuries to his bilateral shoulders as a result of an increased risk or hazard to which the worker would not have been exposed in normal non-employment life. (2) The doctor is further asked to render an opinion regarding whether the alleged accidents were the prevailing (primary) factor causing the injuries, medical condition, disability and need for treatment. If the doctor finds claimant suffered such a series of accidents, he is asked to render an opinion regarding what, if any, additional medical treatment is needed to cure and relieve the effects of the accidental injuries. The doctor is authorized to perform any testing necessary to complete his examination.[6]

Dr. Prostic was to provide ALJ Avery and both counsel copies of the IME report. Both parties then had 10 days to notify ALJ Avery as to whether Dr. Prostic's deposition would be taken. The Order was silent as to what would happen after that. ALJ Avery then issued the aforementioned November 7, 2012, Order.

PRINCIPLES OF LAW AND ANALYSIS

The Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction. K.S.A. 2011 Supp. 44-551(i)(2)(A). In addition, K.S.A. 2011 Supp. 44-534a (a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified. A contention that the ALJ has erred in appointing a physician to conduct an IME and render an opinion on causation is not an issue the Board has jurisdiction to consider. K.S.A. 2011 Supp. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary total disability compensation.

In *Semonick*,[7] the ALJ ordered an IME and requested the physician who conducted the IME to examine claimant and provide a disability rating and recommendations, if any, for future medical treatment, restrictions and loss of task-performing ability, if applicable. The Board stated:

> The Order at issue is not one that establishes compensability, nor is the Order one for medical treatment. Thus, it is neither a preliminary award of benefits entered

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[6] ALJ Order (Oct. 19, 2012) at 1.

[7] *Semonick v. Servicemaster of Southeast KS*, No. 1,044,572, 2011 WL 800430 (Kan. WCAB Feb. 4, 2011).

> under the preliminary hearing statute, nor is it a final award. The Board has previously held that an order for an IME is an interlocutory order. [Footnote omitted.] K.S.A. 2008 Supp. 44-551(i)(1) limits the Board's jurisdiction to review of "final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge…" The ALJ's Order referring claimant for an IME is, in the Board's view, interlocutory in nature.[8]

In *O'Keefe*,[9] the ALJ ordered the claimant to undergo an IME, but authorized the physician performing the IME to provide treatment if the physician was of the opinion claimant's injuries were work related. The Board Member who reviewed the preliminary order determined the ALJ exceeded her authority by delegating the physician the ultimate decision of whether claimant sustained an injury by accident arising out of and in the course of her employment. However, the Board Member in *O'Keefe* stated, "The ALJ has the authority to refer claimant to Dr. Amundson for the purposes of conducting an IME. And her decision to do so is not an appealable issue. [Footnote citing: *Davenport v. Marcon of Kansas, Inc.*, Nos. 1,034,647 & 1,043,900, 2009 WL 3191384 (Kan. WCAB Sept. 21, 2009); *Dodson v. Peoplease*, No. 1,042,494, 2009 WL 1314337 (Kan. WCAB Apr. 09, 2009).]"[10]

In its brief, respondent discusses K.S.A. 2011 Supp. 44-516(a), which states:

> In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

Respondent argues that under K.S.A. 2011 Supp. 44-516(a), only the Director of Workers Compensation, not the ALJ, may employ a neutral health care provider. K.S.A. 2011 Supp. 44-508(i) states director means the director of workers compensation as provided for in K.S.A. 75-5708. K.S.A. 2011 Supp. 75-5708(b) provides that ALJs shall have such powers, duties and functions confirmed upon them by the director or prescribed by law. K.S.A. 2011 Supp. 44-551(i)(1) grants ALJs the power to "conduct an investigation, inquiry or hearing on all matters before the administrative law judges." Appointing a neutral health care provider to examine claimant and render an opinion on causation is an investigation as to whether claimant's injuries are work related. This Board Member finds

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[8] *Id.*

[9] *O'Keefe v. Dollar General*, No. 1,048,370, 2010 WL 1918598 (Kan. WCAB Apr. 14, 2010).

[10] *Id.*

that the ALJ had authority under K.S.A. 2011 Supp. 44-551(i)(1) and 44-516(a) to appoint Dr. Prostic to conduct a neutral IME.

Respondent next contends there must be a finding that claimant sustained a personal injury by accident or injury by repetitive trauma arising out of and in the course of his employment before the ALJ can order an IME. That assertion is not supported by the language of K.S.A. 2011 Supp. 44-516(a), which states that in the case of a dispute as to claimant's injury, a neutral medical provider can be employed. ALJ Avery apparently felt there was an issue as to the causation of claimant's bilateral shoulder injuries and ordered a neutral IME. This Board Member finds that respondent's argument fails.

The last argument of respondent is that ALJ Avery erred by finding in his Order issued on November 7, 2012, that claimant sustained personal injuries by repetitive trauma arising out of and in the course of his employment. Respondent asserts Dr. Prostic's IME report is "effectively the fruit of the poisonous tree."[11] However, respondent did not appeal ALJ Avery's November 7, 2012 Order. Therefore, this Board Member finds the Board has no jurisdiction to review that order.

CONCLUSION

The Board does not have jurisdiction to review ALJ Avery's October 19, 2012, and November 7, 2012, orders. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[12] Accordingly, respondent and its insurance carrier's appeal is dismissed.

WHEREFORE, respondent and its insurance carrier's appeal is dismissed. The ALJ's October 19, 2012, Order remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of January, 2013.

THOMAS D. ARNHOLD
BOARD MEMBER

[11] Resp. Brief at 11 (filed Nov. 16, 2012).

[12] See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

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